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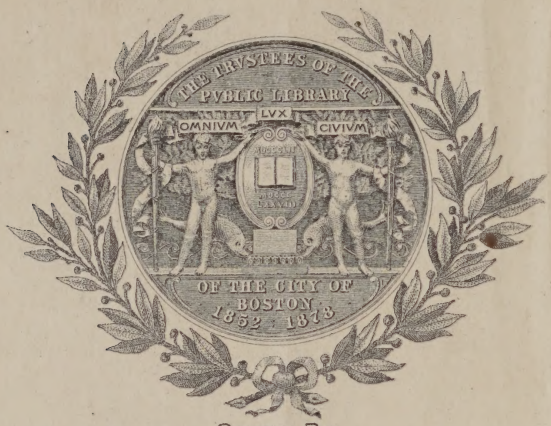

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U.S. Supreme court

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. .

7697.53

FALL RIVER, WARREN & PROVIDENCE RAILROAD COMPANY,

PLAINTIFF IN ERROR,

v.

PAGE, RICHARDSON & CO.

BRIEF FOR PLAINTIFF IN ERROR.

J. H. BENTON, JR.,
Counsel for Plaintiff in Error.

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Josiah H. Benton
June 11. 1914

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No.

FALL RIVER, WARREN & PROVIDENCE RAILROAD COMPANY, *Plaintiff in Error*,

v.

PAGE, RICHARDSON & CO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is a writ of error to reverse a final judgment of the Circuit Court for the District of Rhode Island, in favor of P. Adams Ames and another, citizens of Massachusetts, and against the Fall River, War[illegible] Providence Railroad Company, a railroad corporation unde[illegible] laws of Rhode Island and Massachusetts, for non-performan[illegible] of an alleged contract to furnish sterling exchange, executed in the name of the railroad company by its treasurer on April 16, 1872.

The questions which arise are: —

First. Whether the citizenship of the parties gave the Circuit Court jurisdiction of the cause.

Second. Whether there was evidence that the railroad corporation, plaintiff in error, made the contract for the non-performance of which the judgment was rendered.

The first question was not raised by any plea to the jurisdiction, or motion to dismiss, but was made upon argument, and decided adversely to the plaintiff in error by the Circuit Court.

The second question was raised upon requests for rulings upon

the evidence in the Circuit Court, and exceptions allowed. It arises here upon four assignments of error, which are in reality but two, viz.: —

First. That upon the evidence, which is all embodied in the exceptions, the Circuit Court erred in not finding certain additional facts, as requested.

Second. That the Circuit Court erred in not ruling upon the facts specially found by it, and upon additional facts which it was requested to find, and should have found upon the evidence, that the plaintiff in error did not make the contract sued upon.

Had the Circuit Court Jurisdiction of the Cause?

Statement of facts on this.

The facts upon the question of jurisdiction are these: The railroad corporation, plaintiff in error, was formed by the union of a corporation, created by the state of Rhode Island in 1856, with a corporation created by the Commonwealth of Massachusetts in 1857.

Record, page 15.

The acts of incorporation are printed as an appendix to this brief. Each act provided that the corporation created thereby might unite with the corporation created by the other, and that

> "When the two companies shall be so united, the stockholders of one company shall become stockholders in the other, and the companies shall constitute one corporation by such name as the united corporation may adopt, and all the franchises, property, powers, and privileges, granted or acquired under the authority of the said states respectively, shall be held and enjoyed by all said stockholders in proportion to the number of shares, or amount of property held by them respectively in either or both of the said corporations."

Section 17, Rhode Island Act, Appendix, page 12.

Section 8, Massachusetts Act, Appendix, page 16.

Each act provided that the provisions for union should not take effect until they had been accepted by the stockholders of the two corporations at legal meetings called for that purpose, and also provided for the first meeting of the stockholders of the united corporation for the purpose of organization and election of officers and directors.

The act of each state provided that

> One or more of the directors or other officers of the united corporation should be at all times an inhabitant of that state on whom process might be served, and that the said company should be held to answer in the jurisdiction where service was made and process returnable.

Section 18, Rhode Island Act, Appendix, page 13.
Section 9, Massachusetts Act, Appendix, page 16.

It is conceded that the corporations created by these acts united and formed the defendant corporation, which adopted by-laws, elected directors, and has ever since conducted its business as one corporation.

Record, pages 15, 16.

Points.

I.

It is clear that the Legislatures of Massachusetts and Rhode Island intended to create a new corporation, which should owe its existence to the provision for union in the charters of each of the original corporations. The provisions for union in the acts of incorporation are not mere licenses to the company of each state to exercise corporate powers in the other, as was the case in Pennsylvania Company *v.* St. Louis, etc., R. R., 118 U. S. 290, 296, and in Goodlette *v.* Louisville R. R., 122 U. S. 391, 410, in which case each corporation would have different shareholders, different property, and different directors and officers.

These provisions contemplated identity of shareholders, of prop-

erty and of directors and officers, and that the corporation created by the union should have and exercise an indivisible franchise to own and operate a line of road in both states as one line.

Muller *v.* Dows, 94 U. S. 444, 449.
Railroad Company *v.* Georgia, 98 U. S. 359.
Memphis, etc., R. R. *v.* Alabama, 107 U. S. 581.

The result of the union of the two corporations under the provisions in their charters was the creation of the plaintiff in error as a corporation which, in the language of this Court, in reference to a corporation created in a similar manner,—

> "had a capital stock which was a unit, and only one set of shareholders, who had an interest by virtue of their ownership of shares of such stock in all of its property everywhere."

Graham *v.* Boston, Hartford & Erie R. R., 118 U. S. 161,169.

The jurisdiction of the Circuit Court depended solely upon the fact that the shareholders of the railroad company sued as a citizen of Rhode Island, were all citizens of that state.

This was not proved as a fact, and it cannot be assumed from the acts of incorporation and union.

It has long been settled law that the jurisdiction of the Federal courts in suits by or against corporations depends entirely upon the citizenship of the shareholders of the corporation, who, in case of corporations created solely by one state, are conclusively presumed to be all citizens of that state.

It was first held that a corporation, as such, was not a citizen within the meaning of the constitutional provision giving jurisdiction to the Federal courts of suits between citizens of different states; but that, as a private corporation is in fact but an association of individuals, united for a lawful purpose and permitted to use a common name, the Court would treat the term "citizen," in the Constitution, as intended "to describe the real persons who come into

court under the corporate name," and take jurisdiction in cases where the citizenship of the members of the corporation was such as to give it.

Bank of the United States *v.* Devaux, 5 Cranch, 61.

It was next held that, although the jurisdiction of the Federal courts in cases of corporations " exists only in virtue of the character of its members," the Court would not look to the actual citizenship of the members, but would conclusively presume that the members were citizens of the state by which the corporation was created.

Louisville, etc., Railroad Co. *v.* Letson, 2 How. 497.

The result was that the Court, while holding that corporations, were clearly not citizens within the meaning of the Constitution, practically made them citizens within the meaning of the Constitution.

To say that a corporation is not a citizen, and therefore cannot sue or be sued as such, and then to say that it is to be conclusively presumed that its members are citizens of the state by which it is created, and therefore it can be sued, or sue as a citizen of that state, although its members are not, in fact, citizens of that state, is in effect to say that it may sue or be sued as a citizen of that state. As an original proposition it would seem that as the jurisdiction of the Federal courts in such cases depends upon the citizenship of the members of the corporation, that membership should be established as a matter of fact by the party invoking the jurisdiction of the court, and not by an absolute legal presumption, without reference to the fact.

But it is not necessary to discuss that question in this case, for however proper it may be to absolutely presume that the members of a corporation created by one state, are all citizens of that state, no such presumption can in the nature of things arise in the case of a corporation created by the concurrent legislation of two states, and having one franchise and one set of stockholders.

The fact that under the laws by which the defendant corporation was created its stockholders *must be common stockholders in both*

states, necessarily prevents the presumption that they are citizens of one state only.

It cannot be conclusively presumed that the shareholders of a corporation existing under the legislation of two states, and who are in fact identical, are citizens of one state rather than of the other.

If it be said the shareholders of whose citizenship this presumption is established must be taken to be the shareholders of the original corporation in Rhode Island, the answer is that there are no such shareholders. The only shareholders are those in the united corporation, whose rights are in respect to the railroad in Massachusetts as much as in Rhode Island. The shareholders in this company have a right to vote for directors to manage the entire road; they have a right to require these directors to operate the entire road within the limits of the corporate purpose; they have a right to dividends from the earnings of the entire road, and upon the winding up of the corporation they would have a right to share in the proceeds of the entire road and property in both states.

There are no shareholders in either state as distinct from shareholders in the other, and under the legislation creating the united corporation there cannot be. How, then, can it be assumed that all the shareholders of this corporation are citizens of one state and not of the other?

If it can, then the same corporation can sue or be sued in the Circuit Court of Rhode Island as a citizen of Massachusetts upon the ground that its shareholders are all citizens of Massachusetts, and also sue or be sued in the Circuit Court of Massachusetts upon the ground that its shareholders are all citizens of Rhode Island, or if sued in the courts of either state, may remove the suit to the Circuit Court upon the ground that it is a citizen of the other state.

If it be suggested that states cannot unite in creating a corporation, the answer is that there is no sound reason why two states cannot, by concurrent legislation, confer the same corporate power upon the same natural persons and their successors, and thus create those persons one corporation in both states.

Such a corporation is, of course, subject, so far as it exercises its

franchise within the jurisdiction of either state, to the law of that state, without regard to what may be the law of the other state, and subject to taxation by each state, not only upon it tangible property in that state, but also upon its stock and franchise, so far as the franchise is exercised therein, or its stock represented by property existing therein.

Railroad Company *v.* Vance, 96 U. S. 450, 458.

Either state can, of course, withdraw or modify the franchise which it has granted to these persons, so far as it has reserved the power to do so, and they may doubtless forfeit their franchise in either state by misuser or nonuser.

Atty-Gen. *v.* Petersburg R. R., 6 Iredell, 456.

But while the corporators hold their franchise *under the laws of both states*, and act by virtue thereof as one corporation in both states, how can it be said in a suit in either state that they are a corporation *under the laws of the other state only*.

In Philadelphia, etc., Railroad Company *v.* Maryland, 10 How. 376, 392, decided in 1850, Chief Justice Taney, in delivering the opinion of the Court, said : —

> "The plaintiff in error is a corporation composed of several railroad companies which had been previously chartered by the states of Maryland, Delaware and Pennsylvania, and which, by corresponding laws of the respective states, *were united together and form one corporation* under the name and style of the Philadelphia, Wilmington & Baltimore Railroad Company. The road of this company extends from Philadelphia to Baltimore."

In Railroad Company *v.* Harris, 12 Wall. 65, 82, decided in 1870, Mr. Justice Swayne, in delivering the opinion of the Court, said : —

> "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several existing corporations into a single one. . . . The jurisdic-

> tional effect of the existence of such a corporation as regards the Federal courts is the same as that of a copartnership of individual citizens residing in different states."

In Wilmer *v.* Atlanta, etc., R. R., 2 Woods, 447, Woods, Circuit Judge, appointed a receiver of a corporation created by concurrent legislation of two states, upon the ground that it was one corporation in both states, and subsequently ordered a sale of the entire road, saying, upon the authority of Railroad Company *v.* Harris, that two states might, by concurrent legislation create the same corporate body, and that the defendant was "one and the same corporate body in both states."

See also

Burger *v.* Grand Rapids, etc., R. R. Co., 22 Fed. Rep. 561.

In Copeland *v.* Memphis & Charleston Railroad, 3 Woods, 651, Woods, Circuit Judge, in discussing the question whether a corporation created by the common legislation of two states is a corporation in both states, or is to be considered as a distinct corporation in each state, held that

> "In such a case it is as much a corporation of one state as of the other, and is a citizen of both . . . and there is no legal or constitutional necessity for treating it as two corporations in any suits or proceedings by or against it."

In Bishop *v.* Brainerd, 28 Conn. 289, 299, it was distinctly held that it was competent for the states of Rhode Island and Connecticut by united action to create under their joint authority a corporation composed of two corporations, one existing in each state, the Court saying that it could not be questioned, in view of the authorities, that a state may create a corporation which shall be composed of two or more corporations created by the same state, as well as of two or more natural persons, or that the state may create a corporation composed of natural persons belonging to different states; that there is no more objection to a state creating a corporation composed of corporations chartered by different states, than there is to its

creating one of natural persons belonging to those states; and that there was no objection, technical or otherwise, to the parting by two or more states unitedly, in the exercise of their sovereign authority, with such of their respective powers as shall be necessary in order to confer upon persons, natural or artificial, the franchise or privilege of being a corporation.

See also

Railroad Co. *v.* Georgia, 98 U. S. 359;
St. Louis, etc., R'w'y Co. *v.* Berry, 113 U. S. 465;
Pullman Car Co. *v.* Missouri Pacific Co. 115 U. S. 587;

which all assume the power of two or more states to create one corporation.

In *Ohio & Mississippi R. R. Co.* v. *Wheeler*, 1 Black. U. S. 286, the declaration stated that the plaintiffs were "a corporation created by the laws of the states of Indiana and Ohio, and that the defendant was a citizen of said state of Indiana"; that is to say, it stated *exactly what the proof shows to be the fact as to the creation of the defendant corporation, and the citizenship of its shareholders in this case*, and it was held that the suit must be treated as one in which citizens of Ohio and Indiana were joined in an action against a citizen of Indiana, and therefore the action could not be maintained.*

The recent decision in Nashua & Lowell Railroad Corporation *v.* Boston & Lowell Railroad Corporation, 136 U. S. 356, is doubtless against this contention.

But, as three of the seven members of the court by whom that case was heard dissented from the decision, I have thought it not improper to make this point.

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*The Supreme Court of Pennsylvania followed this decision in *Alleghany* v. *Cleveland, etc., Railroad*, 51 Penn. St. 228, decided in 1865, where it appeared that the defendant company had been incorporated first by the state of Ohio and then by Pennsylvania, saying that a suit against such a corporation must be held to be a suit against citizens of the two states "who have united themselves in business under the shadow of the corporate name," and as some of them are citizens of the same state as the plaintiff, the Federal court has not jurisdiction.

DID THE PLAINTIFF IN ERROR MAKE THE CONTRACT DECLARED ON?

Statement of facts upon this.

The plaintiff in error had as its treasurer one C. T. Child, who was also one of its directors. Its by-law defining the duties of the treasurer was as follows: —

> ARTICLE VII. The treasurer shall give bond in a sum not less than ten thousand dollars, with sureties to the satisfaction of the directors for the faithful performance of his trust. He shall have an office in such place as the directors shall determine accessible to all persons having business with the corporation or any of its officers or agents; he shall keep all deeds, notes and valuable papers of the corporation; he shall collect and receive all assessments, incomes and moneys that may be due to the corporation, and disburse the same as the board of directors may order; he shall surrender notes and other promissory papers on payment thereof, and discharge such mortgages as may have been given securing the same; he shall keep a regular set of books containing the accounts of the corporation, and of all its funds that may pass through his hands; and shall lay before the directors monthly a written statement of all notes, drafts, promises, contracts, made, signed, indorsed or surrendered by him, an abstract of all moneys received and paid by him, and a statement of all property bought or sold, and of such other matters as the directors may deem important; he shall make a complete settlement of his books as often as the board of directors may require, and shall assist in the preparation of the annual reports to the Legislatures of the states of Rhode Island and Massachusetts required by the laws of said states; he shall notify the stockholders of all assessments in the manner prescribed by the bylaws and by the directors; he shall deposit to the credit of the corporation and in such bank or banks as the president may from time to time designate, all moneys by him received, and no payment shall be made by him except by check on such bank or banks. He shall issue certificates of stock to all persons entitled thereto, and permit transfers of stock to be made on books kept by him for that purpose; he shall keep suitable books showing the

number of shares held from time to time by the respective holders, and shall attend faithfully to all the duties of his office prescribed by the charter and bylaws, and to all other duties which the directors may reasonably require him to perform.

Record, pages 9, 10.

There was no vote of the corporation or its directors defining the duties of its treasurer, or conferring power upon him to make contracts for it, and its books and records contain no entry showing any authority to him to make the contracts declared on, and no entry relating thereto; and though he kept a regular set of books, including a book of notes payable, upon which it was his duty to enter all notes made or payable by the corporation and all moneys received by him for it, which books were regularly kept, and all notes and cash entered upon them accounted for by them, they contain no entry of the contracts declared on, or of any money received from them.

Record, page 10.

For about nine months prior to Oct. 9, 1871, it was the custom of Child to make negotiable notes for the railroad company, and send them to its directors to be by them indorsed, and then, with the knowledge of the directors, to discount them at a banking firm in Providence and deposit the check for their avails in his personal account in the Union Bank, of Providence, R. I.

Child was treasurer of several corporations or partnerships, including the railroad company, plaintiff in error, and it was his custom to deposit all money in his hands for them in the Union Bank, to the the credit of his personal account, and pay their maturing notes with his personal checks, charging each one with what he paid on their account on his personal books and also on their own books.

When the contract sued on was executed, the books of the railroad company showed a balance due from it to Child of $3,346.91.

During the four years from April 1, 1867, to April 6, 1871, the National Warren Bank, of Warren, R. I., discounted sixteen negotiable promissory notes signed by the railroad company by Child as

its treasurer, eleven indorsed by him and four by another director of the company, and the avails were deposited by Child to his individual account in that bank, the railroad company having no account therein. It did not appear that this was with the knowledge of the directors of the railroad company, and the notes were all paid as they matured by the individual checks of Child.

Record, page 11.

During the two years and three months from Jan. 22, 1870, to April 24, 1872, the banking firm in Providence discounted twenty-five negotiable promissory notes of the railroad company signed by Child as its treasurer, all but one of which were indorsed by a director or by directors of the company, four of which were indorsed by Child and one other director, and twenty-one of which were indorsed by some other director of the company only. These notes were all duly entered by Child on the books of the railroad company, and paid as they matured.

Record, page 12.

At the time the contract declared on was executed, the railroad company had a floating debt in the form of notes maturing from time to time, but it did not appear how many notes it gave during the time in which Child made these notes, or what proportion the notes thus made by Child bore to all the notes given by it during that period.

Record, page 11.

The defendants in error were bankers in Boston, Mass., with whom Child had personally dealt, but with whom he had never dealt on behalf of the railroad company, and who had never had any transactions with the railroad company whatever.

Record, pages 10, 11.

Feb. 20, 1872, Child went to the bankers in Boston and executed the following instrument: —

Boston, Feb. 20, 1872.

Received of Page, Richardson & Co. for account Fall River, Warren & Providence Railroad, their bill of exchange on Robert Benson & Co., of London, at sixty days' sight, as follows: No. 644 for eighteen hundred and seventy-three pounds stg. (say £1,873), making eighteen hundred and seventy-three pounds stg. (£1,873), and we hereby agree with said Page, Richardson & Co. to furnish them with sterling exchange, or its equivalent satisfactory to them, for the said eighteen hundred and seventy-three pounds sterling, say 1,873, in season to meet the maturity of the said bills in London, paying the Bank of England rate of interest not under six per cent, and a commission of (1%) one per cent, payable in sterling exchange.

(Signed) FALL RIVER, WARREN & PROV. RAILROAD CO.,

by C. T. Child, *Treas.*

Record, page 14.

The bankers gave Child for this a bill of exchange, indorsed by them in blank as follows:—

EXCHANGE FOR 1,873, STG.

Boston, Feb. 20, 1872.

Sixty days after sight of this third of exchange (first and second unpaid) pay to the order of ourselves eighteen hundred seventy-three pounds sterling, value received, and charge the same to account of Messrs. Robert Benson & Co., London.

(Signed) PAGE, RICHARDSON & CO.

Indorsed: No. 644. Page, Richardson & Co.

This bill of exchange was sold by Child for value, and paid by Benson & Co., in London, who charged the amount thereof to the Boston bankers in account.

The contract of Feb. 20 was not performed, and on April 16, 1872, Child went to the bankers in Boston and executed in renewal thereof a precisely similar contract, except as to date, which matured June 14, 1872, and was not performed.

Feb. 20, 1873, the bankers sued the railroad company upon these contracts.

Record, pages 1, 10.

The bankers are not shown to have inquired as to the authority of Child to make the contracts or to have taken any means to ascertain what his authority was. There was no evidence that they knew of the by-law defining the duties of the treasurer, or that they had any knowledge of any previous action by him, as treasurer, or that they knew of the making and discounting of the notes made and discounted at the Warren Bank, and in Providence, or that they relied upon any acts or omissions of the railroad company, or its directors, holding Child out as having any authority to bind the corporation.

Record, page 13.

The borrowing of money by means of sterling contracts similar to that declared on was a usual and ordinary way of borrowing money in Boston, but there was no evidence that the railroad company, its officers or directors, knew it, and there was no evidence that such contracts were a customary means of borrowing money in Providence or Warren, R. I., or that such contracts had ever been made by Child in the name of the defendant, or made by the defendant through any officer, and no evidence that such contracts had been made by any railroad corporation in Rhode Island, Massachusetts or elsewhere, for the purpose of borrowing money.

Record, page 13.

It thus appears that the defendant in error, without taking any means to ascertain whether Child had authority to contract in behalf of the railroad corporation *assumed* that he had authority to bind it by a contract *to deliver English gold at a future time without limitation as to its value, or as to the damages to be recovered in case of the non-performance of the contract*, and upon this naked assumption, wholly unsupported by any knowledge or information, and without any attempt to obtain information or knowledge, they gave to Child

a draft, not payable to the railroad company, but to themselves, and by them indorsed in blank, the avails of which he in fact misappropriated. In other words, they deliberately *took the chances* as to whether Child was authorized to bind the company by such a contract or not.

They now seek to charge the railroad company as having made the contract.

First. Upon the ground that the by-law defining the duties of the treasurer gave him the authority to make the contract which he assumed to make with them.

Second. Upon the ground that if the by-law did not give him authority, then the railroad company, by having held him out as having authority to make and indorse notes for it, had given him implied authority to make the contracts.

Points.

I.

The railroad company had not in fact given Child authority to make the contract. It is conceded that it had given him no specific authority; that there was no vote of the company, or its directors, defining his duties, or conferring power upon him, except as appears in the by-law, and no mention of the contracts, or of any authority to make them, or of any proceeds of them, on the records or books of the company which are regularly kept. The sole inquiry, therefore, upon the question of authority, in fact, is whether the by-law, and the election of Child as treasurer under it, gave him general authority to bind the company by such contracts as these which the Boston bankers assumed to make with him.

These bankers did not know of the existence of the by-law, or of any action under it, and therefore did not rely upon any practical construction of it by the railroad company different from its legal construction. So far, therefore, as they base their claim of Child's authority upon the bylaw, they cannot ask the Court to give it any meaning which its language does not legally import.

They do not claim that this language directly gives any authority to Child to bind the defendant by such contracts. But they claim that it gives such authority by implication.

The exact legal effect of their contention upon this point is this: —

They say that the clause in this bylaw which makes it the duty of the treasurer to lay before the directors a monthly statement of "all notes, drafts, promises, contracts made, signed, indorsed or surrendered by him," gave him authority to make, sign, indorse, or surrender notes, drafts, promises and contracts, at his discretion, *i. e.*, clothed the treasurer with full, independent power to make or indorse such notes, drafts, promises or contracts in the name of the corporation as he pleased, so that upon the election of a person as treasurer under such a bylaw, he at once became clothed with power, independent of any other authority, either specific or implied from the course of business, but *solely by virtue of the by-law*, to bind the corporation to any extent by any kind of a contract he might please to make.

The railroad company, on the contrary, claims that this by-law is only a specific enumeration of duties, and not a delegation of authority; that it is directory, and looks to report of what has been done by authority otherwise conferred, and not to doing something *without other authority*. It says the treasurer shall have an office in such a place, shall keep all deeds, etc., shall collect and receive assessments, shall surrender notes and other promissory papers on payment, shall discharge such mortgages as may have been made, shall keep a set of books, shall lay before the directors monthly a written statement of all notes, drafts, promises, and contracts made, signed, indorsed or surrendered by him, an abstract of all money received, make a statement of all property bought or sold, and all such other matters as the directors may deem important, shall issue certificates of stock, etc., which, so far as making statements of what has been done, obviously presupposes that *it shall have been done by authority otherwise conferred, and not without it.*

There is no middle ground between these constructions. Either

this requirement of the by-law that the treasurer "shall lay before the directors, monthly, a written statement of all notes, drafts, promises, and contracts made, signed, indorsed or surrendered by him," etc., was a delegation of power to the treasurer to make "*all notes, drafts, promises and contracts*" *at his discretion, without further authority*, or it was only a direction to him to lay before the directors, monthly, a statement of all such notes, drafts, promises and contracts as he might have made *with* authority. Either it was only what the company claims or it was a delegation of authority so broad and general that, *acting under it alone without further authority, either by vote of the directors or by course of business*, a treasurer at once upon his election might, as his first official act, bind the corporation by any contract whatever within the corporate power of the company to make, without reference to the nature or extent of the obligation created by it. In short, if this by-law was a delegation of authority to contract at all, it was a delegation of a power to contract as broad as the power of the corporation itself, without check or limit upon its exercise; and as it was a power given by a corporate by-law, it is difficult to see how the directors could in any way control or prevent its exercise by the treasurer at his discretion. It is true they could remove the treasurer, but at once, upon election of a successor, he in turn would become clothed with the same unlimited power, even if they had sought to limit the power by the terms of his election, for directors cannot, unless specially empowered by the charter or by-laws take away or limit the powers given an officer by the by-laws.

If the defendant had by this by-law given its treasurer power to make these contracts, it is because it gave him by the by-law power to make *any* contracts, and if it had, he could bind it by any contract without the consent of the directors, or even against their objection, for his power *under the by-law* was not derived from the directors, nor in any respect subject to their control.

The suggestion that the by-law may be held to give this power because it provides that report of the way in which it has been exercised shall be made to the directors monthly, does not meet the

difficulty, for if the by-law gives authority to make contracts without authority from the directors, the monthly report to them only showed the extent to which a power independent of them, and which *they could not control or limit*, had been exercised. But upon the construction of the by-law that it presupposes other authority outside of it, from the directors to the treasurer, to make contracts, the provision for such report is of value, for by it the directors would know each month how any authority *they* had given had been exercised.

It may well be doubted whether such unlimited, uncontrolled authority to bind a corporation as must be given by a construction of this by-law as giving authority to contract, can ever be given by implication. If it can, the implication must certainly be a necessary one, and cannot arise from language which can take effect in any other way, but only from language which must fail of any effect unless it operates to give such authority. If it is a matter of doubt whether the language used gives such authority, if it requires argument to show that it does, then it does not give it, for all presumptions are against the intention of a corporation to delegate such unlimited, uncontrolled authority to any single officer.

Besides, in this case, such a construction conflicts with the express provisions of the railroad company's charter, which vest "the immediate government and direction of the affairs of the corporation" in its directors, by whom its treasurer is chosen, while the construction claimed by the bankers makes the by-law in effect to vest the management of the most important part of the affairs of the corporation, *i. e.*, the creation of obligations, in its treasurer, independent of its directors. This could not be done even by an express provision of the by-laws, certainly not by implication from language in a by-law which may take effect in another way.

II.

The plaintiff in error had not given Child implied authority to make these contracts.

To prove that it had, the defendants in error were bound to show,

First. That the railroad company had held Child out as having authority to make such contracts as those which they assumed to make with him.

Second. That they knew of this holding him out as thus authorized, and relied upon it in making the contracts.

This contention concedes that Child has no authority in fact to make the contracts, and rests solely upon the proposition that the railroad company had by its conduct estopped itself to deny his authority. The defendants in error say, "True it is you had given your treasurer no authority to make such a contract as he assumed to make with us, but you had held him out as having authority to make such contracts, and we relied upon that holding out, and therefore you are liable upon the contracts as much as though you had given specific authority."

But the railroad company had not held out Child as authorized to make such contracts, and the bankers did not rely upon his having been held out as authorized to make them. They *assumed* that he was in fact authorized. They knew nothing, so far as appears, as to what contracts he had made, or whether he had made any contracts in behalf of the railroad company. They sought no information upon that point, but blindly took their chances as to his having authority in fact.

Reduced to its simplest form the bankers' claim against the railroad company is this: You represented to us that Child was authorized to make these contracts in your behalf. We relied upon this representation, and therefore you are bound by the contracts, although he was not in fact authorized to make them.

The Circuit Court assumed that the directors of the railroad company, by permitting Child to make and indorse notes for it, "conferred upon him, so far as the public was concerned, an implied

power to borrow money," then found that the contract made by him with the bankers was not of such a character as to put them upon inquiry as to Child's authority to make it, and therefore held the company liable upon it. The error was in assuming that the defendants in error, who were not shown to have known or relied upon what the directors had permitted Child to do in respect to making and indorsing negotiable promissory notes could say that *as to them* the company was estopped to deny his authority, and also in assuming that the implied authority to make negotiable paper was an authority to make *contracts to deliver gold as merchandise.*

The title upon which the bankers count is a title by estoppel and

> " a party cannot set up, by way of estoppel against another party, any act or declaration, unless by reason of such act or declaration he has been led to do, or omit to do, something which otherwise he would have not omitted or not done."
>
> Plymouth *v.* Wareham, 126 Mass. 478.

Reliance upon the fact that a person assuming to have authority to act for another has been permitted to act for the other in a similar way is an essential element in all cases of agency by implication or estoppel, and there is no good reason why a person dealing with an agent, and thereby put upon inquiry as to the limitations of his powers, should be allowed to charge the principal upon the ground of any act or omission upon which he does not rely. There is no reason why a person who trusts solely to the representation of another as to his authority to bind a third person should be allowed to charge the third person upon the basis of anything except actual authority to do the thing for which it is sought to charge him.

When Child came to the bankers and assumed to act as agent for the railroad company in making these contracts, they were put upon inquiry as to whether he had authority to make the contracts. If the company had permitted him to make similar contracts with them, or if they had known that it had permitted him to make similar contracts with others, the company would have been properly chargeable upon the contracts which he made with them at that

time, not because he had actual authority to make them, but because, by having permitted him to make them, the company had impliedly represented to the bankers that he had authority, *i. e.*, the company would have been chargeable *upon its representations*. But, as the bankers did not know, and did not seek to ascertain, as they were bound to do, what the authority of Child was, they cannot properly charge the railroad company upon the ground of representations which, *as to them*, did not exist. This is not a case like Merchants' Bank *v.* State Bank, 10 Wallace, 604, 607, where the authority assumed to be exercised was one which it was the custom and usage of business for the agent to exercise, so that by the appointment of the agent he was clothed with implied power to exercise it, but a case where there was no custom, no usage, no actual authority, and where it is sought to charge the principal *solely upon the ground that it held him out, as having the power he assumed to exercise.*

My contention is, that a party cannot count upon a holding out or representation arising from a course of business of which he was ignorant, and as to which he made no inquiry. The bankers took their chances as to actual authority, and contracted with the agent solely upon the assumed basis that he was in fact authorized to by the principal. They did not part with their money upon the basis of any course of business by which the agent was impliedly authorized to make the contract, but solely upon the assumption that he was in fact authorized to contract. The railroad company had done nothing to induce them to contract with Child, and they did not rely upon anything which it had done, or permitted him to do. What right have they now to charge the railroad company upon the basis of that which they did not know, and upon which they did not act?

The railroad company, however, had not held out or represented to any one that Child was authorized to make contracts such as the Boston bankers assumed to make with him. The most that can be said is that it had permitted him to borrow money upon *its negotiable promissory notes* made by him as treasurer, and *indorsed by one or more of its directors*, and in some instances only by himself, he being

a director. From March 26, 1870, to April 6, 1871, he had borrowed money for the company on only three notes made by him as its treasurer not indorsed by some other director, and for nearly a year before the contract in suit was executed by him he had not assumed to borrow money for the company on any note made by him as its treasurer which did not bear the signature as its indorser of one of its directors other than himself.

It also appears that the last note indorsed by him only was about Aug. 9, 1871, so that for more than six months before the making of the contract in suit there had not been in existence a note of the company made by Child as its treasurer, which was not indorsed by one or more of its other directors. It does not appear that the directors did not give Child authority by specific action of direction or ratification to make the notes which he indorsed alone, and it cannot be presumed that he was not so authorized, and yet that is the essential fact upon which it is claimed the company should be held upon the contract sued upon.

A holding out or representation, by which a person is charged for the unauthorized act of another, consists only in a *ratification of previous unauthorized acts.* The law says that the person who has assumed to do the unauthorized act should be held to have had authority to do it, because the person in whose behalf he assumed to do it has adopted and ratified other previous unauthorized acts by him of the same character.

To apply it to this case, the defendants in error say that although Child had no actual authority to make the contracts sued on, still the company is chargeable upon the contracts, because it had previously adopted and ratified unauthorized contracts which he had assumed to make for it. But to constitute a ratification by a corporation of an unauthorized contract by its agent, it must affirmatively appear that the corporation, through its directors or other proper officers, knew of the unauthorized act. There can be no ratification, no holding out, or representation, in a case where there is no knowledge of the act ratified.

And it only appears that during the four years from 1867 to 1871

Child made and discounted at the Warren Bank sixteen notes, or four a year, not endorsed by some other director, and there is not the slightest evidence that the directors knew of these notes, or that there was any special reason why they should. The application of the proceeds of them by Child to pay the notes themselves was manifestly something of which the directors could have no knowledge.

The most that can be assumed, therefore, is that the directors had knowledge of, ratified and held Child out as authorized to make notes in behalf of the company, indorsed by one or more of its directors, and discounted in Rhode Island either at one banking house in Providence, or at one national bank in Warren.

Child was not permitted to borrow generally, without limitation as to means, but only to make and discount certain notes, indorsed by one or more of its other directors, in Providence and at Warren, and to mingle a portion of the money of the corporation with his own, in his private bank account at the Warren Bank.

The effect of thus permitting him to make and discount notes is not enlarged by the fact that he was also permitted to deposit the money with his own in his private account, and that he paid the company's debts with his check on this account. It would hardly be claimed that a private individual, by permitting his collecting and disbursing agent to deposit his money to the private credit of the agent, and to pay his bills with the private check of the agent, thereby held out the agent as authorized to make any contract. The two things are entirely different, and have no relation to each other.

Suppose, in this case, the bankers had inquired what authority Child had to make the contracts declared on, and had been informed that the company had permitted him to deposit a portion of the money which came into his hands, or indeed all of it, in his private bank account, and to pay a portion or all of its obligations with his private check upon this account. Would they have had a right to assume, *from this fact alone*, that the company had authorized Child to make the contracts declared on, in its name?

Can it be pretended for a moment that by permitting a person to

deposit your money in his private account, and pay your bills with his private check on that account, you hold him out as authorized to bind you by contracts in your name?

The only evidence which tends to show that the company held out Child as authorized to make any contracts for it is that relating to the making and discounting of notes in Providence and at Warren. But even if it be held that this evidence tends to show that the directors permitted Child to make promissory notes without specific authority, so that the company might be estopped, as to a person who relied upon this, to deny that he had authority to make negotiable notes, the fact that he was permitted to mingle the money of the defendant with his own neither adds to nor takes from the implied representation of his authority.

But, even if it be assumed that Child was not authorized to make the notes made and indorsed by him and discounted at the Warren Bank, that the directors knew that he made them, and that the subsequent payment of them by him was from funds of the Company, so that the directors must be held to have adopted and ratified his unauthorized making of them, still the effect only is that the directors permitted him, being a director, to make notes for discount at one bank in Rhode Island, to be indorsed by himself. And even if the making of eleven notes in four years at this bank can properly be held to establish a custom, or course of business equivalent to a holding of Child out as authorized to make notes, it was a course of business confined to that bank, and of making of notes to his own order upon which he was liable as maker by virtue of his indorsement, and it was not a course of business upon the basis of which the bankers in Boston, if they had known it, had a right to assume that Child was authorized to make contracts like those which they assumed to make with him.

For substantially two years before the making of the first contract in suit only three such notes had been made, and for more than six months before there had not been such a note in existence. Suppose the bankers, instead of taking their chances, as they did, without inquiry, had inquired, and ascertained just what the evidence shows

as to notes made at the Warren Bank, would they have had a right to assume, as against the Company, that Child ever had, or, if he had, continued to have, authority to bind the Company by any contract upon which they saw fit to lend him money? Would they not have been bound to go further, and ascertain whether he then had such authority, or was still held out as having it? Does the fact that a person has once held out another as having authority to bind him by contract estop him to deny that he has such authority forever after? Does the fact that he has held him out as having such authority at one bank in one town estop him to deny that he has authority to do so at every bank or with every person in every other town, city or place? If not, when does such representation cease to estop him? Manifestly when it is set up under such changed conditions as to distance of time, change of place or circumstances as to raise a fair presumption that it is not applicable to them.

And such I submit was the case here. It was not fairly to be presumed, and the bankers had not a right to assume that because the Company had ratified the notes made by Child at the Warren Bank they therefore continued to authorize the making of notes by him, even at that bank, much less the making of contracts such as those declared on, in another city and State.

But did the directors of the Railroad Company, by permitting Child to make the notes discounted at the Warren Bank and at Brown & Co.'s, which were all indorsed by one or more of the directors other than himself, hold him out as having authority to make the contracts declared on, so that it is inequitable now for it to deny, as to the bankers, that Child was authorized to make the contracts declared on? These notes were twenty-nine in number, five of which were discounted at the Warren Bank and twenty-four at Brown's, in Providence. It is not claimed that the bankers knew that Child had assumed to make these notes; it is not shown that any of them were made without the authority of the directors, and it does appear affirmatively that they were all indorsed, at the time they were made, by one or more of the directors other than Child.

All the suggestions which I have made with reference to the inability of the bankers to charge the Company upon the basis of an estoppel created by its directors having held Child out, *i. e.*, having represented him to be authorized to make the contracts in suit by permitting him to make the notes discounted at the Warren Bank, indorsed only by himself, apply to any claimed representations or holding out of him by permitting him to make these notes, indorsed by other directors. I submit, in addition, however, that permitting Child to make these notes thus indorsed, even if it be assumed that he made them without authority (as I submit it cannot be), was not a holding out or representation that he was authorized to make any contracts *which were not indorsed by some other director*. Concede, for the sake of the argument, that the making of these notes in the manner proved does show that he was held out as authorized to bind the Company by notes indorsed by one or more of its other directors; still the proof falls very far short of establishing the proposition that he was thus held out as having authority to bind it by notes not thus indorsed. It was one thing to permit the making of notes which are brought to the attention of and indorsed by one or more of the directors, and quite another to permit the making of notes not thus brought to their attention, and not thus indorsed. In the one case, there was corporate knowledge of the existence and extent of every obligation incurred; in the other, no corporate knowledge of the obligation or of its extent.

If the bankers had known of the making and payment of these notes thus indorsed they would simply have known that the corporation ratified by performance contracts made with the knowledge, approval and indorsement of one of its directors, *i. e.*, that the corporation had held out and represented its treasurer as authorized to makes notes thus brought to the knowledge of and indorsed by one or more of its other directors. Would they have had a right to assume upon *that representation alone* that the person who made those notes thus known to and indorsed by one or more of its directors was by the corporation authorized to make other notes not thus known and indorsed? They seek to estop the Company from showing that

Child was not authorized to make a contract with them which did not appear to be known to and was not indorsed by any other director, solely on the ground that it had permitted him to make notes thus known and indorsed. *I submit that the estoppel cannot be broader than the representation.* The representation was of authority to make notes indorsed by one or more of the other directors; the estoppel sought to be set up is claimed to extend to the making of notes without such indorsement and without such knowledge. Suppose that the plaintiffs had been asked by Child to give him money upon a note made by him for the Company, and had inquired of him whether he had ever made other notes for it without authority before, and he had told them that he had, but that they *were all indorsed by some one or more of the other directors at the time they were made:* could they have assumed that by reason of this he had a right to make notes *not thus indorsed?* Would they have had a right to say, "Because Child has been permitted to make other notes indorsed by the other directors, therefore the Company is bound to pay any note which he may make, not thus indorsed?" Ought the corporation to be charged upon any note which Child saw fit to make without authority, and which was not known to or indorsed by any of its directors, simply upon the ground that it had previously permitted him to make notes known to and indorsed by one or more of its directors? Concede that, by thus permitting him to make notes thus indorsed, the corporation was estopped to deny to any person who, knowing of this permission, saw fit to lend money upon a note thus indorsed: does it follow that it was estopped to show that he had not authority to make notes not thus indorsed?

A board of directors might be entirely willing that its treasurer should make notes indorsed by one or more of its directors, and not willing that he should make notes without such indorsement. It might be safe to trust to the treasurer the power of making notes with the knowledge and indorsement of one or more of its directors, and unsafe to permit him to make notes not thus indorsed. The proof is that every one of these notes was indorsed, *at the time it was made*, by one or more of the other directors, who thus became

liable upon it, and it is obvious that it was safe for the directors to permit the treasurer to make notes upon which one of its directors thus became liable as a maker: while it was unsafe, negligent, and in violation of their duty to the corporation to look after its affairs and protect its interest for them to permit its treasurer to make notes without the knowledge or indorsement of any director.

It may be suggested that the evidence shows that Child did make and discount notes indorsed only by himself at the Warren Bank, and that this gave the directors knowledge that he had made them; but that of itself would be only *constructive* notice to the directors, which was not sufficient to show ratification or holding out. The doctrine of constructive notice does not apply to the subject of ratification or holding out of an agent as authorized to make contracts beyond his actual authority. It is *knowledge* and not notice which is required to create the ratification, holding out or representation, which is the basis of the creation of an agency by estoppel.

This is well shown in Cartmell's Case, L. R. 9 Ch. App. 691, where it was claimed that the directors of a company had ratified a transfer of shares which was entered upon the transfer register, and embodied in weekly transfer statements and semi-annual statements of accounts submitted to the directors, but of which the directors had no actual knowledge. The claim was that the directors must be held to have had knowledge of that which an examination of the books and statements would have shown; but the Court said that if they had no knowledge in fact, mere constructive knowledge was not sufficient to constitute ratification, and that they could not be held, as a matter of law, to have knowledge of what the books and statements disclosed, and of what, by an examination of them, they would have discovered. Nor can it be said that the knowledge of Child was the knowledge of the Company; for knowledge by an agent of his unauthorized act is no evidence of the ratification o that act by the principal.

Holderness *v.* Baker, 44 N. H. 414.
Tracy *v.* Guthrie, etc., Society, 47 Iowa, 27.
McCullough *v.* Moss, 5 Denio, 567.

The doctrine of constructive notice applies to the law of agency only on the theory that if a person acts through agents he must take the risk that they will communicate to him such knowledge as they have relating to matters within the scope of their duties. But this applies only to knowledge obtained by them *in connection with authorized acts.* In the case of unauthorized acts there is no presumption that knowledge relating to them is communicated, and the outsider who assumes the risk of dealing with an agent, and takes his chances as to whether the act of the agent is within his actual authority or not, if he finds there is no actual authority, and attempts to save himself by the equitable doctrine of ratification or *estoppel*, must bring home to the principal the *knowledge* from which alone such equity can arise. Mere constructive notice, or want of knowledge arising from carelessness on the part of the principal, so that he is ignorant of the unauthorized act solely because he carelessly neglected to ascertain the facts which would have shown it, is not sufficient.

Even if it can be said that the implied authority of an agent to do things beyond the scope of his original authority arising from permitting him to do such things does not stand strictly upon the ground of an estoppel, but really upon the ground that by permitting the agent to do them the principal has given him authority to continue to do them, the Company cannot properly be held to have thus authorized Child to make the contract sued on.

The only ground upon which it could be thus charged would be that by its silence with knowledge, that Child was making notes without authority, it impliedly *directed* him *to continue to make notes.*

Permitting an agent not authorized to contract to make contracts of a certain kind for any length of time is not an implied direction to him to make contracts of a different kind, imposing a different obligation upon the principal.

Implied authority is necessarily limited to an authority to do *that from the doing of which the implication arises.*

Implied authority to contract arising from permitting an agent to so make contracts beyond the scope of his original authority cannot

be broader than actual authority to contract. The railroad company, by merely permitting its treasurer to make notes without authority, could not give him a broader power to contract than would have been given by a by-law or a vote expressly authorizing him to make notes.

Suppose, in this case, the directors had actually directed Child to give the negotiable promissory notes of the company indorsed by himself, or by some other director, to raise money at Warren or at Providence, or in renewal of maturing debts of the company at those places, or the by-law had authorized him generally to give notes, would that have been an authority to him to go to Boston and make a contract to furnish English gold as merchandise, or to make any contract but a negotiable note? If not, how could their merely permitting him to give such notes, which was at most only an implied direction to do in the future what he had done in the past, give him any authority to make any contracts but notes?

The defendant in error says that, as Child had been permitted to borrow money without limitation as to the means he employed, he was thus impliedly authorized to employ such means as he found necessary, and as contracts such as declared on were presumably found necessary to borrow money in Boston, he was impliedly authorized to make them. A sufficient answer to this is that Child had not been permitted to borrow without limitation as to means, but only by means of ordinary negotiable paper at two banks in Rhode Island.

A still further answer is that implied authority does not arise from a failure to *limit* the agent's authority but only *from permitting him to go beyond his authority*. The question here is not whether the company failed to *limit* the authority of Child but of the extent to which it permitted him to *exceed* his authority. If we assume, what is not proved, that the Company had permitted Child to borrow money generally on notes the implication is that he was authorized to borrow on notes, and on notes only.

The implication that the Company intended him to borrow only on

notes is as plain and as just as the implication that it intended he should borrow at all.

The defendants in error suggest that a "person dealing with an agent may infer, from his being allowed to exercise a general power, that he is authorized to exercise that power in any way which would not excite surprise if the principal himself exercised it." But this does not meet the difficulty: first, because the bankers knew nothing about what Child had been permitted to do; and second, because, if they had, they would have known that he had only been permitted to borrow on notes made in a certain way, at two particular places in the State where the business of the corporation was entirely carried on.

They *did not infer anything* from what Child had been allowed to do, for they knew nothing about it, but took their chances in the dark, and, having done so, now seek to charge the company, upon the ground that they did infer that Child had general power to borrow money, from the fact that he had been allowed to exercise the power to borrow in a particular way, and also inferred from this that he had power to borrow, by any means he saw fit to employ, upon any contracts which the defendant itself could make.

No such doctrine has been held in any case. Implied authority to contract has always been confined to making contracts similar to those which had been made. In Lester *v.* Webb, 1 Allen, 34, the suit was upon notes, and the proof was that the agent had been permitted to make notes. In Williams *v.* Cheney, 3 Gray, 215, the question was as to authority to indorse notes, and the proof was that the agent had been permitted to indorse notes.

In Merchants Bank *v.* State Bank, 10 Wall. 604–648, the question was as to the authority of a cashier to certify (*i. e.*, accept) a check drawn on the bank; which, as the Court say, was *exactly like giving a certificate of deposit, and imposed precisely the same liability*, and the proof was, not only that the cashier had been permitted to give checks and certificates of deposit but that such was the custom of all other banks in Boston.

In Mining Co. *v.* Anglo-California Bank, 104 U. S. 192, the

question was as to the authority of the president and secretary of a corporation to sign checks, and the proof was that they had been permitted to sign checks for a long time *upon the same bank upon which the check in question was drawn.*

In Conover *v.* Mutual Ins. Co., 1 Comstock, 290, the question was whether the company was bound by consent to an assignment of its policy executed by its secretary; and it was held bound, upon the ground that the secretary had been in the habit of signing such consents previously, in every instance in which they had been made.

Commercial Bank *v.* Norton, 1 Hill, 502, was where one partner had been permitted by the others to make and indorse notes, and draw drafts, etc., in the name of the firm, and they were held to have thus held him out as authorized to accept drafts, *i. e.*, to bind them by an obligation of the same kind, and creating the same obligation as those he had been permitted to make.

In Prescott *v.* Flinn, 9 Bing. 22, the question was of authority to indorse, and the proof was of previous indorsements.

But in any aspect of the case the Railroad Company cannot be charged upon the contract, because it is not such a contract as it had permitted Child to make, but one *essentially different in its nature and in the character of the obligation imposed by it.*

It is a contract which *prima facie* the Railroad Company itself had no corporate power to make. The Company had power by its charter to construct and maintain a railroad, and though the power to borrow money for the purpose of building and maintaining the railroad was necessarily incidental to the accomplishment of that purpose, and therefore a part of the corporate power, still the power to borrow for that purpose was necessarily limited to the power to borrow by the ordinary means, *i. e.*, by such contracts as are ordinarily made for the purpose of borrowing money. It is upon this ground only that in the United States (although not in England) railroad corporations have *prima facie* power to make negotiable paper. The power to make negotiable notes rests wholly upon the ground that they are an ordinary means of raising money to carry out the purpose for which the corporation is established, and as it is a matter of

common knowledge that the making of negotiable paper is an ordinary means of borrowing money, the Court will take judicial notice of that fact, and hold the railroad corporation liable upon negotiable paper without proof that it is an ordinary and usual means of borrowing money. But it is not a matter of common knowledge that contracts such as those declared on are an ordinary and usual means of borrowing money, and therefore it was necessary for the defendants in error to show by proof that such contracts were an ordinary and usual means of raising the money *in order to bring them within the corporate power of the corporation to make.* Such proof, however, did not show that the treasurer was authorized to make such contracts. The mere fact that the contracts were a means of borrowing money, which the corporation itself might lawfully use, did not warrant the bankers in assuming that *therefore* the treasurer of the Railroad Company had authority to make them, any more than the mere fact that negotiable notes are a means of borrowing money would warrant one in assuming that the treasurer of a railroad corporation is authorized to make them in its behalf. To bind the corporation in either case it must be shown that the treasurer has been given actual authority to make the contracts or notes, or that the corporation has held him out as thus authorized, so that as to a person who has relied upon such holding out, it cannot deny that, it has in fact authorized him.

The defendants in error, therefore, recognizing that mere proof that the treasurer had been permitted to make negotiable notes would not estop the Railroad Company to show that he had no authority to make contracts to deliver foreign money, attempted to show that he had been held out as having authority to borrow money without limitation as to the kind of contract or obligation of the Company which he should give for the money borrowed, which they claim held him out as authorized to make contracts such as, by the custom of the commercial world, were used in borrowing money, that is, contracts which everybody who gave general authority to another to borrow money for him must be presumed to understand and know he might make. It does not appear, however, that the directors *knew* that such contracts were a customary means of bor-

rowing money, and therefore, even if it be held that, by permitting Child to make and indorse promissory notes to the extent shown, had they held him out as authorized to borrow money generally (which I deny), they cannot be held to have held him out as authorized to make such contracts unless it is shown that the use of such contracts was so general that the directors must be assumed to have known of it, which is obviously not the case; for no custom was proved in the light of which persons giving authority to borrow money could be presumed to have acted, and it was not proved that such contracts had been made by any railroad corporation anywhere for the purpose of borrowing money.

Record, page 13.

And the proof was that the officers of three of the principal terminal roads in Boston and the officers of three of the principals banks in Boston had never heard of such contracts.

Record, page 20.

It may be claimed that my contention upon this point is open to the objection that it seeks to make the knowledge or ignorance of the principal a criterion of the latitude of the agent's powers. But this assumes that I am discussing upon this branch of the case the lattitude of the agent's powers *in fact*, which is not true. I am considering only the question whether the Railroad Company had so represented and held out Child as having authority that it is estopped to deny that he had actual authority in this case. The bankers say that because the company had represented that Child had general authority to borrow money, and therefore, by implication, that he had authority to use the customary means of borrowing money, therefore, for the purpose of showing that this representation *was broad enough to cover authority to make the contracts declared on*, they must show not merely that the contracts were *a* means of borrowing money, or a *usual and ordinary* means of borrowing money, but that they were a *customary* means, which they failed to do.

The only contracts which Child had made were negotiable prom-

issory notes which imposed definite obligations. The contract declared on is a definite agreement which imposes an uncertain obligation. It is a promise to furnish a certain amount of foreign money *as merchandise* without reference to its value in money of the United States, and one, which, under certain circumstances, such as its appearing that the non-appearance of it could not be adequately compensated in money, might entitle the promisee to a decree for specific performance.

By this contract Child assumed to bind the Company to furnish a certain amount of English gold, which was precisely as though he had assumed to bind it to furnish a certain amount of iron, wool, wheat, lumber, or any other article of merchandise. The damages to which the Railroad Company would be subject for non-performance of the contract were as uncertain as the damages to which it would be subject for the non-performance of a contract to deliver bricks or lumber. It was not a contract to pay money, but a contract to deliver personal property; and the question is whether permitting a person to make contracts to pay money is holding him out as authorized to make contracts to deliver merchandise. If it is, then the result is that, by permitting Child to make notes, the Company held him out as authorized to make any kind of a contract upon which he could obtain money, and if he had found it convenient to get money upon a contract to deliver shares of stock, or flour, or iron, or wheat, or wool, he could have bound the Company by such a contract.

It cannot, however, be said that a person by holding out another as authorized to make promissory notes creates an estoppel to show that he is not authorized to make contracts to deliver merchandise, although the purpose of making the contract to deliver the merchandise is to obtain money. The estoppel does not rest upon the *purpose* for which the contract is made, but upon the fact of the previous holding out of the person who made it as authorized to make it.

Cox *v.* Hoffman, 4 Dev. & B. N. C. 180.
Chidsey *v.* Porter, 21 Pa. St. 390.

Stringham *v.* St. Nicholas Ins. Co., 4 Abb. Ct. Ap. 315, S. C., Keyes, 280.
Railroad Co. *v.* Weaver, 34 Md. 431.
Bank *v.* Norton, 1 Hill, 501.
Salem Bank *v.* Gloucester Bank, 17 Mass. 1.
Keene *v.* Piper, 4 Watts, 222.
Terry *v.* Fargo, 10 Johnson, 114.
Cooley *v.* Willard, 34 Ill. 69.
Hawtayne *v.* Bourne, 7 M. & W. 595.
Burmester *v.* Norris, 6 Exchequer, 796.
Aultman *v.* Jones, 1 Woolworth, 99.
Howell *v.* Gorden, 40 Ga. 302.
Morris *v.* Watson, 15 Minn. 212.

But the bankers say further that the money paid by them to Child was received by the Company, although he did not actually apply it to its uses or account for it to it, and ask how a debtor to the corporation could get the money with which he should pay his debt any further into the hands of the corporation than this went, *i. e.*, into the hands of its treasurer. But we are not dealing with a case of a payment by a debtor to a corporation, in which case, of course, payment to the person who is authorized to receive payment, as Child was by the by-law, and as by the mere election of him as treasurer he would legally be without any by-law, but with a case where an agent has assumed to make a contract beyond the scope of his authority.

To say that because the agent in such a case is the person who is authorized to receive payment of debts due the corporation therefore the receipt by him of the proceeds of the unauthorized contract is a receipt of it by the corporation is in effect to say that the receipt by an agent of the proceeds of a contract which it is beyond the scope of his authority to make is a receipt of it by the principal, so that, whether he applies it to the benefit of the principal, or accounts for it to him or not, the principal is chargeable upon the contract, which is obviously not the law. In the case of the Merchants' National Bank, the coin purchased by the cashier was by

him accounted for, and actually went into the possession of the bank, so that the bank was liable for the value of it.

The fact that because Child, upon his books, appears to have advanced more money for the Company than he had received, and therefore it might have turned out upon an accounting between him and it that it was indebted to him, does not render the Company liable upon the contract, whether authorized by it or not. A principal is not liable upon any contract which his agent may make beyond the scope of his authority, and which he is not estopped to show was beyond the scope of the agent's authority, simply because at the time the agent made the unauthorized contract the principal was indebted to him. The validity of the contract cannot depend upon the state of accounts between the principal and the agent.

The character of this transaction was such as to put the bankers upon inquiry as to the authority of Child.

It was one not within the scope of the general powers of a treasurer of a railroad corporation.

In West St. Louis Savings Bank *v.* Shawnee Bank, 95 U. S. 557, it was held that the cashier of a bank had no implied authority to bind it as an accommodation indorser of his own note, because such a transaction was not within the scope of his general power, and therefore carried notice to a purchaser of a possible want of power to make the indorsement. The same is true in this case. The bankers could not presume that the making of a contract to deliver British gold was within the scope of the ordinary business intrusted to the treasurer of a railroad corporation. The form of the transaction put them upon inquiry as to a possible want of authority. If they chose to assume the existence of the authority, and act without inquiry, the loss which resulted therefrom was produced by their neglect, and they alone should bear it.

Proof that the contracts were a means of borrowing money, or even an ordinary means of borrowing money in Boston, does not help the matter. The banker knew that Child was the treasurer of a railroad corporation in another State, with which they had never had any dealings. They knew that power to make such contracts

was not inherent in the office of treasurer of a corporation. They knew that if such authority had been given by a course of business it must be limited by the character of the business, and could extend only to the making of such contracts as had been made in that course of business. They knew that they had never lent money to him as treasurer on such contracts, or on notes, or any other obligations, and they did not know or inquire whether any one else had done so in Boston. He took a bill of exchange indorsed in blank, and on the face of the transaction it was one which, though it might be for the benefit of the corporation, might equally well be for his. They had no right to *assume* that such a transaction was one they could enter into with Child without inquiry, at the risk of the corporation.

They were at least bound to ask for *some* evidence of Child's authority; and if they had, the want of his authority to make these contracts, such as were unknown to more than a small part of the business world, and wholly unknown in railroad business, would have been at once ascertained, and his fraudulent scheme defeated.

J. H. BENTON, JR.

APPENDIX.

RHODE ISLAND ACT, MAY SESSION, 1856.

An Act to Incorporate the Warren and Fall River Railroad Company.

It is enacted by the General Assembly as follows:

Section 1. William L. Baker, George Wheaton, Charles Wheaton, Charles Smith, Charles T. Child, R. B. Johnson, Nathan Dunn, Thomas G. Turner, James Coffin, John O. Waterman, Wingate Hayes, and their associates, successors and assigns, be and they are hereby made a corporation by the name of the Warren and Fall River Railroad Company, and they shall be capable in law to sue and be sued to final judgment and execution, plead and be impleaded, defend and be defended against in any court of record or in any other place whatever; to make, have and use a common seal, and the same to break or alter at pleasure; to make, ordain and establish all such by-laws, rules and regulations for their own government and for the management of their concerns as they shall deem expedient and necessary to accomplish the designs and purposes and to carry into effect the provisions of this act; and shall be and are hereby vested with all the powers, privileges and immunities which are or may be necessary to carry into effect the purposes and objects of this act as hereinafter set forth; and the said corporation is hereby authorized to locate, lay out and finally complete a railroad, commencing in or near the compact part of the town of Warren, thence easterly through the town of Warren, to the line of the State of Massachusetts, with power to build such lateral branches to said railroad as may be deemed expedient, in such manner and form as may be deemed expedient.

And for this purpose said corporation is authorized to lay out a road not exceeding six rods wide through the whole length; and for the purpose of cutting embankments and obtaining stone and gravel and of making tracks to and from their depots and car houses, may take and use as much more land as may be necessary for the proper security and construction and use of said road: *provided*, that all damages which may be occasioned to any person, company or corporation by taking of such land or materials for the purposes aforesaid, shall be paid for by the corporation in the manner hereinafter provided; and said corporation may purchase and hold such real estate and such materials, cars, ferry boats, engines and other things as may be necessary for depots for the use of said corporation, and for the transportation of persons, goods and merchandise. Said corporation shall have power to lay their rails upon any highway in the town of Warren: *provided*, such rails be laid with the assent and used under the direction and regulation of said town.

Sect. 2. The capital stock of said corporation shall consist of not more than fifteen hundred shares, the number of which may be determined from time to time by the directors of said corporation, and no assessment shall be laid thereon of greater amount in the whole than one hundred dollars on each share; said shares shall be deemed personal estate, and may be transferred in writing in such manner and in such books, or the conveyance or transfer shall be recorded in such books, as the by-laws of said corporation shall direct; and the immediate government and direction of the affairs of said corporation shall be vested in not less than five directors, who shall be chosen by the members of said corporation, at such time and place and manner, and shall hold their offices for such terms as the by-laws of said corporation shall direct, and until others shall be duly elected in their places, and a majority of whom shall form a quorum for the transaction of business. They shall have power to fill any vacancies which

may occur in said board; the tenure of office of the directors so chosen to be the same as that of said other directors. They shall elect one of their own number as president of the board, who shall also be president of the corporation; and shall have authority to choose a clerk and a treasurer, who shall give bond to the corporation with sureties satisfactory to the directors for the faithful discharge of their trusts; and such other agents and officers as the by-laws of said corporation shall direct.

SECT. 3. The annual and all other meetings of said corporation shall be called and notified in such manner, and shall be held at such times and places, as shall be prescribed by the by-laws of said corporation; and the number of members present, or of shares represented, necessary to constitute a quorum at a stockholders' meeting, shall be regulated by the by-laws of said corporation; and at such meetings each member shall be entitled to one vote for each share held by him: *provided*, that no member shall be entitled to any vote for any share beyond one tenth of the whole number of shares of said corporation, unless as proxy for absent members; and any member absent may have a right to vote by proxy, duly authorized in writing.

SECT. 4. If the stock shall not have been subscribed, the company organized, and the location of the route filed in the Court of Common Pleas of the county within which the land proposed to be taken for the use of said railroad is situated, previous to the first day of March, A. D. 1858, or if, the stock being so subscribed, the company organized and the location made as aforesaid, the corporation fail to complete the said railroad before the first day of September, A. D. 1860, in either of the above-mentioned cases this act shall be null and void and of no effect.

SECT. 5. The president and directors for the time being are hereby authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation for the purposes of locating, constructing and

completing said railroad and its branches, and all such other powers and authority for the management of the affairs of the corporation, not heretofore granted, as may be necessary and proper to carry into effect the objects of this grant; to purchase lands, materials and other necessary things in the name of the corporation for the use of said road; to make such assessments, from time to time, on all the shares in said corporation as they may deem expedient and necessary in the progress and execution of the work, and direct the same to be paid to the treasurer of the corporation, and the treasurer shall give notice of all such assessments; and in case any stockholder shall neglect to pay his assessments for the space of thirty days after notice by the treasurer of said corporation, the directors may order the treasurer to sell such share or shares at public auction, after giving not less than thirty days' notice in one newspaper at least, in this State, and the same shall be transferred to the purchaser; and such delinquent stockholder shall be entitled to the surplus, if his share or shares shall sell for more than the assessment due, with interest and cost of sale.

SECT. 6. Said company shall have power to subscribe and pay from their corporate funds for stock in the Fall River and Warren Railroad Company incorporated by the State of Massachusetts, to any extent not exceeding one thousand shares of one hundred dollars par value each.

SECT. 7. A toll is hereby established for the sole benefit of said corporation, on all passengers and property of every description, which may be conveyed or transported upon said road, at such rates per mile as may be agreed upon and established from time to time by the directors of said corporation; the transportation of persons and property, the construction of wheels, the forms of cars and carriages, the weight of loads and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations and provisions as the directors shall from time to time prescribe and direct; and said road may be used by

any persons who may comply with such rules and regulations: *provided*, *however*, that if at the expiration of five years from and after the completion of said road, the net income or receipts from the tolls and other profits shall have amounted to more than twelve per cent per annum upon the whole cost of the road and appurtenances, the general assembly may take measures to alter and reduce the rates of tolls and other profits in such manner as to take off the overplus for the next five years, calculating the amount of transportation upon the road to be the same as the five preceding years; and at the expiration of every five years thereafter the same proceedings may be had, and the rate of tolls may be raised in case the net receipts shall have been less than twelve per cent during the five preceding years.

SECT. 8. The directors of said corporation for the time being are hereby authorized to erect toll-houses, to establish gates, appoint toll-gatherers, and demand and collect toll upon said road when completed, and upon such parts thereof as shall from time to time be completed; and they shall from year to year make a report to the general assembly of their acts and doings under the provisions of this act. And the books of said corporation shall be open for the inspection of a committee of the general assembly at their pleasure; and it shall be the duty of the treasurer of said corporation, when required by the general assembly, to render an account of the receipts and expenditures of said railroad under oath.

SECT. 9. Whenever said corporation shall have located said railroad, or any part thereof, they may make report thereof to the Court of Common Pleas then next to be holden within and for the county within which said location is made, at any term thereof, wherein they shall particularly describe the bearings of the intended route, or any section thereof so located, and the names of the owners of the lands through which the same may pass, so far as they can be ascertained; which report so made shall be placed on the files of said court, and notice thereof shall be given to the

owner or owners of the land embraced therein, if known, in such manner as the court shall direct, at the expense of said corporation; and said court shall thereupon appoint three discreet and disinterested persons of this State (vacancies, if any happen, to be filled by said court), to estimate all damages which any person or persons whose land or lands are described or mentioned in such report shall sustain: *provided*, such railroad or any appendage or appurtenance thereof be constructed thereon. And the said commissioners, before they proceed to execute their duties, shall be sworn to a faithful and impartial discharge thereof, and they shall give seasonable notice in such manner as said court shall direct, to all persons interested to file their claims, if any they have, which have not been released to said corporation, with one of the commissioners or with the clerk of said court, within thirty days from the date of said notice. At the end of the term allowed for filing such claims for damages, the commissioners, or a majority of them, having given notice to all parties interested of the time and extent of the route to be examined, by publishing, in one or more of the newspapers printed in the county of Bristol, an advertisement thereof, in three successive papers at least, shall meet on the premises so intended to be used by said corporation for the purposes aforesaid, and, after hearing the parties interested, shall estimate all such damages as they shall think any person shall sustain by the construction of said railroad through his land. And the said commissioners, or a majority of them, shall make a return of their doings as soon as may be to said Court of Common Pleas; and the said court shall thereupon order the said report, or the substance thereof, to be forthwith published in one or more of the newspapers printed in said county of Bristol, three weeks successively, at the expense of the corporation. And if the said corporation or any person interested shall be dissatisfied with the estimate of said commissioners, application may be made by said dissatisfied party at the next term of said Court of Common

Pleas, after the return of such report, and after its publication as aforesaid, for a jury to hear and finally determine upon the amount of damages to be assessed in the case complained of; where said application shall be heard and tried under the direction of the court by a jury, in the same manner that appeals are heard in said court. And, if the party injured in his or her estate apply for such jury, and fail to obtain such increase of damages, such party shall be liable for all legal costs arising after the entry of such application for a jury, and such court shall enter judgment and issue execution accordingly. And if such corporation apply for a jury, and fail to obtain diminution of damages, it shall in like manner be liable for costs, and said court may enter judgment and issue execution for such costs. And if, within thirty days after any damage shall have been finally assessed in manner aforesaid, said corporation shall not pay or cause to be paid such damages, if any, so assessed in manner aforesaid by said commisioners or such jury, such person in whose favor any such damages shall have been assessed may have an action of debt against said corporation in any court proper to try the same to recover such damages; and execution from whatever court the same may issue for damages assessed as aforesaid, and costs, shall be in common form, and may be levied upon the goods, estate and lands of said corporation; and the report of said commissioners, when accepted and recorded and not appealed from in manner aforesaid, or the verdict of a jury returned and recorded, shall forever be a bar to any other action commenced for damages against said corporation, on account of the injury for which said damages were awarded, other than is herein provided. And said commissioners, in all cases, shall be allowed three dollars a day for their services: *provided*, that nothing in this act contained shall be construed to prevent said corporation from commencing the construction of their railroad, or constructing the same on the land of any person, or from taking or using the land or materials

of any person, for the construction or security of said railroad under their said charter, before the damages for taking and using said land and materials shall have been estimated or assessed by the commissioners or a jury; and in case of such taking and using before the estimate or assessment of damages, the damages shall be assessed by the commissioners or a jury, and like proceedings had with the same effect as if said estimate or assessment had been made before the taking and using of said land or materials.

SECT. 10. The commissioners appointed to estimate or assess damages, may, upon request in writing of any person whose land or materials may be reported as located for the use of said railroad, require said corporation to give security to the satisfaction of said commissioners for the payment of all such damages as shall be finally awarded by said commissioners or a jury for the land or materials of the person so requesting, reported as located as aforesaid, and for all costs which may be by him recovered against said corporation; and all right and authority of said corporation to enter upon or use such lands or materials, except for the making of surveys, shall thereupon be suspended until such corporation shall give such security as may be required.

SECT. 11. Said corporation, after having located, or reported as located, or taken and used land or materials for the uses of their said railroad, shall have power, if they shall find it expedient, to alter the location and vary the direction of their said railroad in any portion of the general route, or of the lateral branches of said railroad, contemplated by their charter, and to make a new location of the same in whole or in any part in which report shall be made; and damages for land or materials taken or located and proposed to be taken for the use of said railroad shall be estimated or assessed, and like proceedings in all respects had with like effect, as if said railroad or the portion thereof located anew had not before been located: *Provided, however*, that the time allowed by the charter of said corpora-

tion, for completing their said railroad, shall not be extended in consequence of such alteration.

SECT. 12. In case of any such new location, the said corporation may, in their report thereof, state what portion of their former location has been abandoned, specifying the person or persons whose land or materials in whole or in any part have been abandoned in consequence of such new location; and if the land or materials of any person before reported as located shall not have been taken and used, all proceedings for the estimate and assessments of damages in favor of such persons shall stop; said corporation first paying to every such person whose land or materials located shall have been abandoned as aforesaid, his costs, if any, incurred in prosecuting for damages up to the time of such abandonment; said costs to be taxed by the court to whom the new location is reported. If the land or materials of any person before reported as located have been taken or used by said corporation as the site of, or in constructing and securing their said railroad, and the assessment of damages for the same is then pending before the commissioners or a jury, then upon such new location and abandonment as aforesaid, said corporation shall have the right to give said abandonment in evidence in diminution of the damages, paying costs, if the question of damages is pending before a jury on appeal, notwithstanding a diminution of the damages in consequence of such abandonment then first given in evidence; or if the commissioners or a jury have finally assessed the damages, said corporation, in case of a new location and abandonment as aforesaid, shall have a right to a revision of the assessment of damages and to a reassessment of the same by petition to the commissioners, in order that the diminution of the damages in consequence of such abandonment may be considered, with right of appeal and upon like terms to either party as in other cases. The filing of such petition for revision of damages and notice to the person or persons affected thereby, shall perpetually stay

all action or rights of action for the recovery of the damages first assessed, the said corporation first making tender of the taxed cost in such actions, if any be pending in the clerk's office of the court where the same may be pending, up to the time of such tender.

SECT. 13. When the lands or other property or estate of any married woman, infant, or person *non compos mentis*, shall be necessary for the construction of said railroad, the husband of such married woman, and the guardian of such infants, or persons *non compos mentis*, may release all damages in relation to the lands or estates to be taken and appropriated as aforesaid, as they might do if the same were holden by them in their own rights respectively: *Provided*, the same be done with the advice and direction of the court of probate of the town where the land or estates lie.

SECT. 14. If the said railroad in the course thereof shall cross any private way, the said corporation shall so construct said railroad as not to obstruct the safe and convenient use of said private way; and if said railroad shall not be so constructed, the party aggrieved shall be entitled to his action on the case in any court proper to try the same, and shall recover his reasonable damages for such injury. And if the said railroad in the course thereof cross any canal, turnpike or highway, the said railroad shall be so constructed as not to impede or obstruct the safe and convenient use of such canal, turnpike or other highway; and the said corporation shall have power to raise or lower such turnpike or highway, so that the said railroad, if necessary, may conveniently pass under, or over, or across the same. And if the said corporation shall raise or lower any such turnpike or highway, pursuant hereto, and shall not so raise or lower the same as to be satisfactory to the proprietors of such turnpike, or the town council of the town in which said highway may be situated, as the case may be, said proprietors or town council may require in writing of said corporation such alteration or amendment as they shall deem neces-

sary; and if the said corporation shall refuse or unreasonably neglect to make the same, such proprietors or town council, as the case may be, may file their complaint with the Court of Common Pleas for the county in which said turnpike or highway may be; and if said court shall adjudge that said alteration is reasonable and proper, they shall decree that the same may be made by the said corporation, and render judgment accordingly. And in case said corporation shall neglect to comply with said judgment within the time prescribed by said court, the said proprietors or town council, as the case may be, may proceed to make such alteration or amendment, and may institute and prosecute to final judgment and execution, in any court proper to try the same, an action of the case against said corporation, and shall therein recover a reasonable indemnity in damages for all charges, disbursements, labor and services occasioned by making such alterations and amendments, with costs of suit. The said corporation are hereby required to build and maintain, at their own expense, fences on both sides of the road, to be constructed by them at all places where they may be at any time requested by the owners of the land adjoining said road. And they shall not run or use any car, either for passengers or freight on any part of their railroad, until the fences required on such part are completed: *Provided, However*, that said corporation shall not be required to build or maintain fences along the line of said railroad where the same may pass over tide waters, unless, in the opinion of the commissioners appointed to assess the land damages as aforesaid, such fences shall be necessary.

Sect. 15. In all proceedings, whether in law or equity, in which said corporation shall be a party, the leaving an attested copy of the writ, summons or other process, with any director of said corporation, residing in this State, or with the treasurer or agent of said corporation, or at their usual place of business in this State, or either of them, shall be deemed a sufficient service thereof; and all executions

that shall issue against said corporation may be levied on the property of said corporation of every description, or in such manner as the General Assembly may hereafter prescribe for the service of process or levying of execution against said corporation.

SECT. 16. If any person shall wilfully, maliciously or wantonly, and contrary to law, obstruct the passage of any caraiage on said railroad, or in any manner spoil, injure or destroy said railroad, or any part thereof, or anything belonging thereto, or any materials or implements to be employed in the construction or for the use of said railroad, he, or any person assisting, aiding or abetting in such trespass, shall forfeit and pay to said corporation for every such offence treble such damages as shall be proved before the justice, court or jury proper to try the same, by the treasurer of the corporation, or other officer whom they may direct, to the use of said corporation: *Provided*, that nothing in this section contained shall affect any criminal proceedings under the eighteenth section of the act concerning crimes and punishments.

SECT. 17. The said Warren and Fall River Railroad Company is hereby authorized to unite with a railroad company which may be empowered by the legislature of the State of Massachusetts, at the State line of the State of Rhode Island, at some point on the east line of the town of Warren; and when the two companies shall be so united, the stockholders of one company shall become stockholders in the other company; and the companies shall constitute one corporation, by such name as the united corporation may adopt. And all the franchises, property, powers and privileges granted or acquired under the authority of the said State, respectively, shall be held and enjoyed by all said stockholders, in proportion to the number of shares or amount of property held by them, respectively, in either or both of said corporations; and all powers conferred by this charter upon said corporation, to be exercised by the presi-

dent and directors thereof, or by their agents, and especially the power to lay out, construct and complete their said railroad and its branches, and to take and use the land and materials of persons for the site of said railroad, and for the purpose of properly constructing and securing the same, shall, upon the union of said corporation with the railroad company, to be incorporated by any other State or States, be vested in the corporation to be formed by such union, to be exercised by the directors of said united corporation or their agents; the first election of the directors of said united corporation to take place on the day agreed on by the directors of the respective corporations at stockholders' meetings of said corporations specially called by their respective directors for that pupose; said meetings to be held at the same time and place as a meeting of the stockholders of the united corporation.

SECT. 18. One or more of the directors or other officers of said company, as is provided in the preceding section, shall at all times be inhabitants of this State, on whom process against said company may be lawfully served; and said company shall be held to answer in the jurisdiction where the service is made and the process is returnable.

SECT. 19. The said company shall keep separate accounts of their expenditures in the State of Rhode Island and in the State of Massachusetts respectively; and two commissioners shall be appointed, one by the governor of each of said States, to hold their offices for the term of four years, and to be reasonably compensated by said company, who shall decide what portion of all expenditures of said company, and its receipts and profits, properly pertain to that part of the route lying in said States respectively; and the annual report required to be made to the Legislature of this State shall be approved by said commissioners.

SECT. 20. The said company and the stockholders therein, so far as their road shall be situated in this State, shall be subject to all the duties and liabilities of the

Warren and Fall River Railroad Company, created by the provisions of this act, and to the general laws of this State.

SECT. 21. The provisions contained in the four preceding sections shall not take effect until said provisions shall have been accepted by the stockholders of the said two corporations respectively, at legal meetings called for that purpose.

SECT. 22. The first meeting of this corporation, for the purpose of organization, may be called by a majority of the persons named in the first section of this charter, who shall have subscribed for twenty shares or upwards of the stock of said corporation, at such time and place in the town of Warren as they may agree upon, by publishing a notice of such meeting for at least two weeks in one of the newspapers printed in the city of Providence, and in one newspaper printed in the town of Warren.

MASSACHUSETTS ACT, CHAPTER 25, LAWS OF 1857.

AN ACT TO INCORPORATE THE FALL RIVER AND WARREN RAILROAD COMPANY.

Be it enacted, etc., as follows:

SECTION 1. Joseph G. Luther, William Pierce, William Wilber, Mason Brown, Benjamin Robinson, their associates and successors, are hereby made a corporation by the name of the Fall River and Warren Railroad Company, with all the powers and privileges, and subject to all the duties, liabilities and restrictions set forth in the forty-fourth chapter of the Revised Statutes, and in that part of the thirty-ninth chapter of said statutes which relates to railroad corporations, and in the several statutes subsequently passed relating to railroad corporations.

SECT. 2. The said company is hereby authorized and empowered to locate, construct, fully complete and maintain a railroad with one or more tracks, commencing at the line of

the State of Rhode Island, in the town of Swanzey, thence running in an easterly direction, through the towns of Swanzey and Somerset, to the city of Fall River.

SECT. 3. The capital stock of said company shall consist of one thousand shares of one hundred dollars each, and no assessment shall be laid thereon of a greater amount in the whole than one hundred dollars on each share; and no shares shall be issued for a less sum or amount, to be actually paid in on each, than the par value of the shares which shall be first issued. And the said company may take, purchase and hold such real estate, and may build, purchase and hold such engines, cars, materials and other things, as may be necessary for the use of the said railroad, and for the transportation of persons, goods and merchandise.

SECT. 4. Said company is hereby authorized to establish and maintain a ferry between the terminus of their railroad, on the northerly side of Taunton River and the city of Fall River; and said company may receive such tolls for ferriage on the same as the county commissioners of Bristol county shall from time to time designate.

SECT. 5. If the location of the said railroad be not filed according to law within two years, or if the said railroad shall not be constructed and completed, with at least one track, within four years from the passage of this act, then this act shall be void.

SECT. 6. The legislature may authorize any company to enter, with another railroad, upon and use the said Fall River and Warren Railroad, or any part thereof, paying therefor such a rate of toll or compensation as the legislature may from time to time prescribe, or as may be fixed by any general law of this Commonwealth, and complying with such rules and regulations as may be established by the said Fall River and Warren Railroad Company.

SECT. 7. The legislature may from time to time reduce the rate of tolls or other profits upon the said railroad; but the tolls shall not, without the consent of said company, be

so reduced as to produce, with the said profits, less than ten per cent per annum.

SECT. 8. The said company is hereby authorized to unite with a railroad company which may be incorporated by the State of Rhode Island, to build a railroad connecting the western terminus of the railroad, hereby authorized, with the compact part of the town of Warren, in said State of Rhode Island; and when the said company shall have become so united, the stockholders of one company shall become the stockholders of the other company, and the two companies shall constitute one corporation, by such name as the united corporation may adopt; and the franchises, property, power and privileges, acquired under the authority of the said States, respectively, shall be held and enjoyed by all the stockholders, in proportion to the number of shares or amount of property held by them respectively, in either or both of the said corporations.

SECT. 9. One or more of the directors, or other officers of the said united corporations, shall, at all times, be an inhabitant of this Commonwealth, on whom process against the said company may be legally served; and the said company shall be held to answer in the jurisdiction where service is made and the process is returnable.

SECT. 10. The said company shall keep separate accounts of its expenditures in Massachusetts and Rhode Island, respectively; and two commissioners shall be appointed, one by the governor of this State and the other by the governor of the State of Rhode Island, if the said State of Rhode Island shall thereto agree, to hold their offices for the term of four years, and to be reasonably compensated by the said company, who shall decide what portion of all expenditures of the said company, and of the receipts and profits, properly pertain to that part of the road lying in the said States, respectively; and the annual report required to be made to the legislature of this Commonwealth shall be approved by the said commissioners.

SECT. 11. The said company and the stockholders therein, so far as the road is situated in Massachusetts, shall be subject to all the duties and liabilities created by the provisions of the laws of this Commonwealth, to the same extent as they would have been had no union of the said companies taken place.

SECT. 12. The provisions contained in the four preceding sections of this act, and all provisions of this act which contemplate a union of the said companies, shall not take effect until they shall have been accepted by the stockholders of the said two corporations, respectively, at legal meetings called for that purpose.

SECT. 13. The said railroad company shall not commence the construction of its road in this State until a certificate shall have been filed in the office of the secretary of the Commonwealth, subscribed and sworn to by the president of the said company and a majority of the directors thereof, stating that all of the stock named in its charter has been subscribed for by responsible parties, and that twenty per cent of the par value of each and every share of the said stock has been actually paid into the treasury of the company.

(Approved March 17, 1857.)